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<PREAMB>

**<AGENCY TYPE='S'>OFFICE OF PERSONNEL MANAGEMENT**

**<CFR>5 CFR Part 792**

**<RIN>RIN 3206-AL36**

**<SUBJECT>Agency Use of Appropriated Funds for Child Care Costs for Lower Income Employees**

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Office of Personnel Management is adopting as final changes to its regulations concerning alcohol and drug abuse counseling programs for employees and changes to its regulations concerning agencies' use of appropriated funds to provide child care subsidies for lower-income civilian employees. The changes would clarify the scope of regulations for alcohol and drug abuse programs for Federal civilian employees; change the definition of "child"; expand regulations to extend coverage to child care services for children of same-sex domestic partners of Federal employees; make certain technical corrections; and make other changes designed to render the regulations clearer and more concise.

**DATES:** Effective July 20, 2012.

**FOR FURTHER INFORMATION CONTACT:** Ingrid Burford, (202) 606-0416 or email [Ingrid.burford@opm.gov](mailto:Ingrid.burford@opm.gov).

**SUPPLEMENTARY INFORMATION:** On July 28, 2011, the U.S. Office of Personnel Management (OPM) published proposed regulations (76 FR 45208) revising part 792 of

title 5, Code of Federal Regulations. This final rule makes changes in both subparts of that part, concerning employee assistance programs and child care subsidies for low-income employees, respectively, in response to the President’s direction in Presidential Memoranda dated June 17, 2009 (Dailey Comp. Pres. Docs., 2010 DCPD No.00450, p.1.), and June 2, 2010, that agencies consider extending benefits, where possible, to same-sex domestic partners, and OPM’s determination to make benefits available to same-sex domestic partners, to the extent feasible, in this context. The changes to subpart A also remove obsolete references to title 42 of the United States Code.

During the comment period, we received six comments in response to the proposed rule. Most of the comments supported the proposed changes. However, two commenters – an agency and an advocacy group – recommended that, for the purposes of the child care subsidy program, OPM revise the definition of “domestic partner” to include opposite-sex domestic partners as well as same-sex. The agency commented that the distinction OPM had drawn “will limit agencies from providing an equitable policy to opposite-sex couples having legal documentation of their status as a domestic partner in a legal domestic partnership. It is [the agency’s] position that employees in same-sex and opposite-sex domestic partnerships should be treated equally.” The agency then provided examples of States and cities that recognize both kinds of partnerships.

The advocacy group observed that abandoning the distinction would “further expand the number of lower-income employees who will be able to access these child care subsidies.” It “encourage[d] OPM to cover all qualified families, including unmarried opposite sex couples . . . .” That commenter further stated that adopting the

definition of “domestic partner” as stated in the current OPM regulations for annual, sick, and funeral leave would make the definitions consistent across OPM.

Although we considered these comments, we did not change our definition for the purposes of the child care subsidy program. OPM undertook to make this change because, currently, Federal employees are unable to use this benefit with respect to children of their same-sex domestic partners.

Opposite-sex couples may obtain these benefits by entering into marriage. This is not an option for same-sex couples with respect to Federal benefits, because of the defense of Marriage Act, 1 U.S.C. 7.

The same agency commenter questioned the inclusion of annuitants in the definition of a “domestic partner,” since annuitants are not eligible by law for the child care subsidy program. The commenter suggested we remove the reference to annuitants. We concur and have revised the regulations to remove the reference.

One agency highlighted concerns regarding the documentation that would be required for Federal agencies to verify the establishment of a domestic partnership and total family income requirements for eligibility for the child care subsidy program. Since this benefit became available by law, OPM has always given agencies authority to set their own thresholds, as well as requirements for what information to solicit from employees to qualify for the child care subsidy program. We provide guidance and sample documents agencies may require, but we do not regulate the specific types of acceptable documentation. Agency policies should require same-sex domestic partners to provide the same kinds of documentation they require married employees to provide.

The advocacy group referenced above expressed concerns that the definition of “child” may have the unintended consequence of restricting access to a child care subsidy because the child may belong to the non-earning parent, and not the Federal employee. It recommends that OPM adopt a definition of “child” used by the Department of Labor. Specifically, the commenter recommends including the following wording: “. . . (6) A child for whom the employee, the employee’s spouse, or the employee’s domestic partner stands in loco parentis.” (A reference to standing in loco parentis would, in the advocacy group’s view, include those with day-to-day responsibilities to care for or financially support a child, regardless of the existence of a biological or legal relationship.) An agency raised a similar comment. OPM believes the definition in the proposed rule is sufficient and will not restrict access in the manner suggested; it allows either the domestic partner or the employee to be the individual who make the contributions for the support of the child, and the child would still be considered eligible for the child care subsidy program in either event.

#### **<HD1>Background**

On June 17, 2009, President Obama issued a Memorandum, entitled “Federal Benefits and Non-Discrimination,” that requested the Secretary of State and the Director of OPM, in consultation with the Department of Justice, to extend previously identified statutorily-based benefits that those agencies believed could be extended to qualified same-sex domestic partners of Federal employees consistent with underlying law. This Memorandum also directed the heads of executive departments and agencies, in consultation with OPM, to conduct a review of the benefits offered by their respective departments and agencies to determine whether they had the authority to extend such

benefits to the same-sex domestic partners of Federal employees. The Memorandum further requested that OPM, in consultation with the Department of Justice, make recommendations regarding any additional measures that could be taken to provide benefits to the same-sex domestic partners of Federal Government employees, consistent with existing law.

On June 2, 2010, the President issued another Memorandum, entitled “Extension of Benefits to Same-Sex Domestic Partners of Federal Employees,” that published the results of the review and identified the benefits that could be extended to same-sex domestic partners and their families. We issued our proposed regulations in response to section 1(a)(i) and (ii) of the President’s Memorandum, which identified additional benefits OPM had concluded it could offer and requested OPM to “(i) clarify that the children of employees’ same-sex domestic partners fall within the definition of ‘child’ for purposes of Federal child-care subsidies, and, where appropriate, for child-care services” and “(ii) clarify that, for purposes of employee assistance programs, same-sex domestic partners and their children qualify as ‘family members.’”

Also on June 2, 2010, OPM issued a Memorandum for the Heads of Executive Departments and Agencies, entitled “Implementation of the President’s Memorandum Regarding Extension of Benefits to Same-Sex Domestic Partners of Federal Employees” to help fulfill the Administration’s policy. The Memorandum provides definitions to help agencies apply the President’s Memorandum in the same way, to the extent consistent with applicable law. .

**<HD1>Final changes to the regulations concerning drug and alcohol abuse programs**

The final rule will add a new provision in section 792.101 of title 5, Code of Federal Regulations, to clarify that an employee's domestic partner, and any children of the employee's domestic partner, are included within the employee's "family" for purposes of access to alcohol and drug abuse programs. These programs, for the most part, are already accessible by individuals whose personal relationship to the employee (including but not limited to the employee's domestic partner) is close enough to potentially affect the employee's performance on the job. Therefore, the addition of specific references to domestic partners and their children is a clarifying change to promote consistent implementation of this regulation across the Government.

For purposes of this regulation, we have chosen not to define "domestic partner" or "domestic partnership." Agencies are already providing access to these programs to individuals who are close enough to the employee to potentially affect the employee's performance on the job. Our intent is to clarify that same-sex domestic partners meet this standard, but not to limit agency discretion to decide that other relationships, including opposite-sex domestic partnerships, also meet this standard.

#### **<HD1>Final changes to the child care subsidy regulations**

The final rule adopts changes to subpart B to clarify and consolidate regulations governing Federal agencies' use of appropriated funds to provide child care subsidies for lower-income civilian employees. The revision corrects the way the age limitation for covered children is expressed and updates obsolete references and citations. The regulations currently provide that the subsidies may apply to child care for children from birth through age 13 and for disabled children through age 18. We amended this provision to state that the regulations apply to children under age 13 and disabled

children under age 18. This change will help ensure that agency child care subsidy programs under part 792 conform to qualification rules used by the Internal Revenue Service for determining the tax treatment of dependent care assistance plans.

The final rule makes additional clarifying changes, including elimination of the question-and-answer format that currently appears in subpart B. We adopted a narrative format to consolidate and remove repetitive content and content that is not regulatory in nature. The changes also include certain corrections to definitions, such as removing the “living with” requirement from the definition of “biological child” and changing the defined term from “child care contractor” to “child care provider,” which is the term actually used in the regulation.

We added definitions of “domestic partner” and “domestic partnership” to subpart B. These definitions are based upon the OPM Memorandum described earlier in this Supplementary Information and have been used in other OPM regulations.

Paragraph (4) of the definition of “domestic partnership” requires that the partners “share responsibility for a significant measure of each other’s financial obligations.” This criterion, which appears in this and in prior regulations promulgated in response to the President’s June 2, 2010, Memorandum, is intended to require only that there be financial interdependence between the partners; it should not be interpreted to require the exclusion of partnerships in which one partner stays at home while the other is the primary breadwinner.

We have made a slight change to the wording of criterion (7). That criterion is intended to prohibit recognition of domestic partnerships between individuals who are related in a manner that would preclude them from marrying were they of opposite sexes.

We are maintaining this criterion, but clarified that the determination is to be made at the time the domestic partnership is formed. It should not be re-examined if the couple relocates to a different jurisdiction. This approach is consistent with the treatment of opposite-sex marriages.

Unlike the change to the regulations involving drug and alcohol abuse programs discussed above, these regulations extend “domestic partnership” benefits only to same-sex couples who are currently unable to obtain spousal benefits by entering into a Federally recognized marriage. That is because child care subsidies are currently available only for expenses associated with the employee’s children or children of the employee’s spouse. Accordingly, it is appropriate to include the children of same-sex domestic partners in order to reflect the new policy to extend benefits to the same-sex domestic partners of Federal employees to the same extent such benefits are available to opposite-sex spouses, consistent with law.

The reference in paragraph (8) of the “domestic partnership” definition to documentation or proof of a dependent or family member relationship for purposes of eligibility for evacuation payments would be based on each agency's internal policies. Agencies have authority to request additional information in cases of suspected abuse or fraud, and they would continue to be able to exercise that authority under these proposed regulations. Agencies would be expected to apply the same standards for verification of requests for payments for all dependent and family member relationships, including domestic partners.

We are changing OPM’s annual requirement to produce a report on agencies’ use of the authority to pay child care subsidies, to a biannual requirement. OPM will



continue, however, to collect annual data from Federal agencies on their child care subsidy programs.

Our proposed regulation proposed to add to the authority citation for part 792 by including the President's Memorandum of June 2, 2010. Upon further deliberation we concluded not to include that document in the authority citation, because the President's Memorandum is an expression of administration policy rather a source of positive authority, which actually derives from the statutes previously cited. We are proceeding with the change of the title of the part from "Federal Employees' Health and Counseling Programs" to "Federal Employees' Health, Counseling, and Work/Life Programs" so that it is broad enough to encompass the child care subsidy program.

**<HD1>E.O. 12866, Regulatory Review**

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Orders 12866 and 13563.

**<HD1>Regulatory Flexibility Act**

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because they would affect only Federal agencies and employees.

**<LSTSUB><HED>List of Subjects in 5 CFR Part 792**

Alcohol abuse, Alcoholism, Day care, Drug abuse, Government employees.</LSTSUB>

<SIG>U.S. Office of Personnel Management.

<NAME> John Berry,  
<TITLE>Director.</SIG>

Accordingly, the U.S. Office of Personnel Management amends 5 CFR part 792 as follows:

<REGTEXT TITLE='5' PART=' 792 '>

**<PART><HED>PART 792 – FEDERAL EMPLOYEES’ HEALTH, COUNSELING, AND WORK/LIFE PROGRAMS**

1. The authority citation for part 792 is revised to read as follows:

**<AUTH><HED>Authority:**<P> 5 U.S.C. 7361-7363; Sec. 643, Pub. L. 106-58, 113 Stat. 477; 40 U.S.C. 590(g).

2. The part 792 heading is revised to read as set forth above.

**<SUBPART><HED>Subpart A – Alcoholism and Drug Abuse Programs and Services for Federal Civilian Employees**

3. The heading for subpart A is revised to read as set forth above.

4. Section 792.101 is revised to read as follows:

**§ 792.101 Statutory requirements.**

Sections 7361 and 7362 of title 5, United States Code, provide that the Office of Personnel Management is responsible for developing and maintaining, in cooperation with the Secretary of the Department of Health and Human Services and with other agencies, appropriate prevention, treatment, and rehabilitation programs and services for Federal civilian employees with alcohol and drug abuse problems. To the extent feasible, agencies are encouraged to extend services to families (including domestic partners and their children) of alcohol and/or drug abusing employees and to employees who have

family members (including domestic partners and their children) who have alcohol and/or drug problems. Such programs and services should make optimal use of existing Government facilities, services, and skills.

5. Section 792.102 is revised to read as follows:

**§ 792.102 General.**

It is the policy of the Federal Government to offer appropriate prevention, treatment, and rehabilitation programs and services for Federal civilian employees with alcohol and drug problems. Short-term counseling or referral, or offers thereof, constitute the appropriate prevention, treatment, and rehabilitation programs and services for alcohol abuse, alcoholism, and drug abuse required under subchapter VI of chapter 73 of title 5, United States Code. Federal agencies must establish programs to assist employees with these problems in accordance with that subchapter.

6. In § 792.105, revise paragraph (b) to read as follows:

**§ 792.105 Agency responsibilities.**

\* \* \* \* \*

(b) Agencies must issue internal instructions implementing the requirements of 5 U.S.C. 7361-7363 and this subpart.

\* \* \* \* \*

7. Subpart B is revised to read as follows:

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Sec.**

**792.201 Purpose.**

**792.202 Definitions.**

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**792.204 Agency responsibilities; reporting requirement.**  
**792.205 Administration of child care subsidy programs.**  
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**<SUBPART><HED>Subpart B – Agency Use of Appropriated Funds for Child  
Care Costs for Lower Income Employees**

**§ 792.201 Purpose.**

The purpose of this subpart is to implement section 590(g) of title 40, United States Code, which permits an Executive agency to use appropriated funds to improve the affordability of child care for lower-income employees. The law applies to child care in the United States and in overseas locations. Employees can benefit from reduced child care rates at Federal child care centers, non-Federal child care centers, and in family child care homes.

**§ 792.202 Definitions.**

In this subpart—

*Child* means a child who bears any of the following relationships to an employee, the employee's spouse, or the employee's domestic partner:

- (1) A biological child;
- (2) An adopted child;
- (3) A stepchild;
- (4) A foster child;
- (5) A child for whom a judicial determination of support has been obtained; or
- (6) A child to whose support the employee, the employee's spouse, or the employee's domestic partner makes regular and substantial contributions.

Child care provider means an individual or entity providing child care services for which Federal employees' families are eligible. The provider must be licensed or regulated, and the provider's services can be provided in a Federally-sponsored child care center, a non-Federal center, or a family child care home.

Child care subsidy program means the program established by an agency in using appropriated funds, as provided in this subpart, to assist lower-income employees with child care costs. The program can include such activities as determining which employees receive a subsidy and the size of their subsidies; distributing agency funds to participating providers; and tracking and reporting information to OPM such as total cost and employee use of the program.

Disabled child means a child who is unable to care for himself or herself because of a physical or mental condition as determined by a physician or licensed or certified psychologist.

Domestic partner means a person in a domestic partnership with an employee of the same sex.

Domestic partnership means a committed relationship between two adults of the same sex in which the partners—

- (1) Are each other's sole domestic partner and intend to remain so indefinitely;
- (2) Maintain a common residence, and intend to continue to do so (or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle);
- (3) Are at least 18 years of age and mentally competent to consent to a contract;

- (4) Share responsibility for a significant measure of each other's financial obligations;
- (5) Are not married or joined in a civil union to anyone else;
- (6) Are not the domestic partner of anyone else;
- (7) Are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which the domestic partnership was formed;
- (8) Are willing to certify, if required by the agency, that they understand that willful falsification of any documentation required to establish that an individual is in a domestic partnership may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification, as well as constitute a criminal violation under 18 U.S.C. 1001, and that the method for securing such certification, if required, will be determined by the agency; and
- (9) Are willing promptly to disclose, if required by the agency, any dissolution or material change in the status of the domestic partnership.

Employee means an employee as defined in section 2105 of title 5, United States Code.

Executive agency means an Executive agency as defined in 5 U.S.C. 105 but does not include the Government Accountability Office.

Federally-sponsored child care center means a child care center located in a building or space that is owned or leased by the Federal Government.

OPM means the U.S. Office of Personnel Management.

**§ 792.203 Child care subsidy programs; eligibility.**

(a)(1) An Executive agency may establish a child care subsidy program in which the agency uses appropriated funds, in accordance with this subpart, to assist lower-income employees of the agency with their child care costs. The assistance may be provided for both full-time and part-time child care, and may include before-and-after-school programs and daytime summer programs.

(2) Two or more agencies may pool their funds to establish a child care subsidy program for the benefit of employees who are served by a Federally-sponsored child care center in a multi-tenant facility.

(3)(i) Except as provided under paragraph (a)(3)(ii) of this section, an agency may impose restrictions on the use of appropriated funds for its child care subsidy program based on consideration of employees' needs, its own staffing needs, the local availability of child care, and other factors as determined by the agency. For example, an agency may decide to restrict eligibility for subsidies to—

- (A) Full-time permanent employees;
- (B) Employees using an agency on-site child care center;
- (C) Employees using full-time child care; or
- (D) Employees using child care in specific locations.

(ii) An agency may not limit the payment of subsidies to accredited child care providers.

(b) Subject to any restrictions applicable under paragraph (a)(3)(i) of this section, an employee who qualifies as a lower-income employee under the agency's child care subsidy program is eligible to receive a child care subsidy for the care of each child under age 13 or, in the case of a disabled child, under age 18.

**§ 792.204 Agency responsibilities; reporting requirement.**

(a) Before funds may be obligated as provided in this subpart, an agency intending to initiate a child care subsidy program must provide notice to the Subcommittees on Financial Services and General Government of the House and Senate Appropriations Committees, as well as to OPM.

(b) Agencies must notify the committees referred to in paragraph (a) of this section and OPM annually of their intention to provide child care subsidies. Funds may be obligated immediately after the notifications have been made.

(c) Agencies are responsible for tracking the utilization of their funds and reporting the results to OPM in a manner prescribed by OPM.

(d) OPM will produce a biannual report on agencies' use of the authority to pay child care subsidies; however, OPM will collect annual data from the agencies.

**§ 792.205 Administration of child care subsidy programs.**

(a) An agency may administer its child care subsidy program directly or by contract with another entity, using procedures prescribed under the Federal Acquisition Regulations. Regardless of what entity administers the program, the Federal agency is responsible for establishing how eligibility and subsidy amounts will be determined.

(b) An agency contract must specify that any unexpended funds will be returned to the agency after the contract is completed.

**§ 792.206 Payment of subsidies.**

(a) Payment of child care subsidies must be made directly to child care providers, unless one of the following exceptions applies:



(1) In overseas locations, the agency may pay the employee if the provider deals only in foreign currency.

(2) In unique circumstances, an agency may obtain written permission from OPM to pay the employee directly.

(b) An agency may make advance payments to a child care provider in certain circumstances, such as when the provider requires payment up to one month in advance of rendering services. An agency may not make advance payments for more than one month before the employee receives child care services except where an agency has contracted with another entity to administer the child care subsidy program, in which case the agency may advance payments to the entity administering the program as long as the requirements in § 792.205(b) are met.

</REGTEXT>

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